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Department of Energy

ROCKY FLATS OFFICE
P.O. BOX 928
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JUN 02 1993

93-DOE-06505

Mr. Gary Baughman
Hazardous Waste Facilities Unit Leader
Colorado Department of Health
4300 Cherry Creek Drive South
Denver, Colorado 80222-1530

Dear Mr. Baughman:

The Department of Energy (DOE) acknowledges receipt of your response to DOE's request for schedule extension for the Operable Unit 4 Solar Ponds Phase I Draft and Final RFI/RI Reports. DOE objects to the action taken by the State and, in accordance with the Interagency Agreement (IAG), paragraph 92 and paragraph 226 hereby submits a written Statement of Dispute and seeks a determination that good cause exists to grant our request.

DOE appreciates your detailed presentation of the Division's position per the IAG paragraph 224. DOE, Division, and EPA staff members have made a reasonable effort to informally resolve this dispute. We understand that the Table 6 timetable for the two subject reports shall only be extended in accordance with the outcome of the dispute resolution process, per IAG paragraph 225. The extension does not affect a RCRA or CHWA permit, to the DOE's knowledge.

The nature of the dispute lies in the DOE's and the Division's differing assessments of what items constitute good cause for a schedule extension. DOE's position is that good cause exists for the extension requested in our letter of May 4, 1993. Further information on DOE's position and the information used by DOE to arrive at that position are provided in the attached statement, per IAG paragraph 92.

This Statement of Dispute is transmitted in good faith, and DOE agrees to work with the Division and the EPA to expedite, to the extent possible, the dispute resolution process. DOE reiterates its commitment to the purposes of the IAG, including to investigate potential environmental impacts at the Rocky Flats Plant and to promote an orderly and effective investigation and cleanup of contamination at the site.

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G. Baughman
93-DOE-06505

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Please contact Rich Schassburger (966-4888) or Frazer Lockhart (966-7846) for further actions on this dispute.

Sincerely,



James K. Hartman
Assistant Manager for Transition
and Environmental Management

Enclosure

cc w/Enclosure:

M. Hestmark, EPA
H. Belencan, EM-453
S. Surovchak, ERD
S. Keith, EG&G

cc w/o Enclosure:

R. Greenberg, EM-453
A. Rampertaap, EM-453
A. Pauole, OOM
R. Benedetti, EG&G

June 2, 1993

WRITTEN STATEMENT OF DISPUTE

on

STATE RESPONSE TO REQUEST FOR SCHEDULE EXTENSION,
PHASE I DRAFT AND FINAL RFI/RI REPORTS, OU4

NATURE OF THE DISPUTE

- 1) The Department of Energy (DOE) requested extension to two primary deliverables listed in Table 6 of the Interagency Agreement (IAG), OU4 Phase I Draft RFI/RI Report and OU4 Final RFI/RI Report. The request was made by letter dated May 4, 1993 and was both timely and provided good cause for an eleven month extension to the milestones. The Colorado Department of Health (CDH) partially granted the extension request by letter dated May 19, 1993, acknowledging good cause and allowing an extension for 79 days (approximately four months) to both milestones.
- 2) The DOE has evaluated the impact to related milestones based on this extension request and provided that information in the original request. No impact to Table 6 milestones for OU4 beyond the Phase I reports are projected according to the Proposed Strategy for IAG Compliance and supporting attachments. Central to this strategy is regulatory acceptance of Phase I RFI/RI Reports and IM/IRA Decision Documents with 80 to 95 percent of the OU4 field data. All data (100 percent) is considered prior to final IM/IRA design and Phase II RFI/RI Report submission. No response was provided on this issue in the May 19, 1993 CDH letter. The DOE seeks a response on this issue.
- 3) All three parties to the IAG have responsibilities for oversight and coordination as described in Part 36, Project Coordinators, of the IAG. The oversight role of the regulators has been actively pursued through daily phone conversations, and site visits or meetings among working level staff at least bi-monthly. Through these and other communication vehicles the regulators had considerable information on the status of activities at OU4. All information available and known should be considered in determinations of good cause.
- 4) Resolution of this dispute may establish precedence regarding timing and procedure for additional scope added through regulatory agency comments.

DEPARTMENT OF ENERGY POSITION

The DOE disagrees with the CDH position on good cause as stated in the May 19, 1993 Statement of Nonconcurrency. The DOE further believes some information known to all parties and relevant to the extension request was not considered. The DOE position relative to specific topics of dispute and information relied upon to determine that position are provided below.

1) Workplan Approval. The CDH allowed no additional time for procurement and other related activities when the OU4 Phase I RFI/RI Workplan (the workplan) approval was delayed by 88 workdays from January 6, 1992 to May 8, 1992. It is the DOE position that the scope of the workplan was expanded considerably due to comments from both CDH and EPA. This resulted in additional work as described in Part 32 of the IAG. Accordingly, the IAG requires "... sufficient time to perform the additional work or modified work and to complete other work affected by such additional or modified work." The time taken by the DOE to revise the workplan and by CDH to provide comments, reviews, and approvals was a direct result of the additional work added to the scope. It follows that any related activities, such as procurement, are to be provided additional time commensurate with the time provided for the additional work. The DOE therefore maintains that the time taken by the DOE and CDH to address the additional work was justified and immediate implementation of the workplan could not have been expected to occur prior to May 8, 1992, the date of final workplan approval.

The DOE disagrees with the CDH position that the delays in approval were based on deficiencies in the originally submitted workplan. The first workplan submittal in June 1990 preceded the IAG and revised operable unit priorities resulting from public comment. All parties agreed (verbally) that the OU4 characterization would be significantly improved by a major rewrite of the workplan. The DOE submitted a workplan with major revisions in November 1991 which met the requirements of paragraph VI of the IAG Scope of Work. The December 1991 CDH comments, particularly as related to the Conceptual Flow Model, plan for pond liner repairs, vadose zone monitoring, alternative geophysical instrument analysis, and aquifer modeling, were not required to provide full characterization of the OU4 site and support a remediation decision. In a show of good faith, the DOE agreed to complete this additional work and modify the workplan. Since the December 1991 CDH comments encompassed nineteen pages, the DOE proposes to specifically discuss each

point that added scope during efforts to resolve this dispute. However, it is the DOE's expectation that the schedule should be extended by 88 workdays to reflect the time required to accommodate this additional work. In addition, the DOE believes that a clear protocol for schedule adjustment based on added scope should be defined through this dispute process for use throughout the remainder of the IAG.

2) Mobilization Delays. The CDH allowed no additional time for mobilization delays from a variety of factors. The DOE asserts that there were two significant drivers behind the additional mobilization time, implementation of a workplan within a Radiation Controlled Area (RCA) and implementation within the Protected Area (PA) security zone. This is the first workplan to be executed with these two complicating factors. While it is true that the DOE is responsible to execute the workplan in consideration of plant requirements, it is also true that a learning curve exists with any work performed under a new set of protocols. This learning curve was experienced for the first fieldwork (non-RCA, non-PA) on Operable Units 1 and 2. However, this effort predated the IAG and firmly established milestones. We believe the lessons learned from this early fieldwork helped with timely mobilization for OU1 Phase III, OU2 Phase II, OU3, OU5 and OU6 under the IAG. The OU4 mobilization was the first to require consideration of PA security requirements and RCA health and safety requirements. It is the DOE position that this learning curve is a justifiable cost of IAG execution at a Federal Superfund site which is still in operational status, and therefore 42 workdays (2 months) should be accepted as good cause.

3) Incorrect IAG Procurement Assumptions. The CDH allowed no time for procurement of a subcontractor following approval of the workplan on May 8, 1992. This was based on language within the IAG Scope of Work and IAG Schedule assumptions dated August 14, 1990 which assumed all procurement work would be done in parallel with regulatory approval of the documents. The DOE position is that complete parallel scheduling for procurement is unrealistic and cannot be achieved under any circumstances. This is based in Federal Acquisition Regulations (FAR) and DOE Acquisition Regulations (DEAR) which require a definition of scope prior to contract award. The DOE has experienced past problems with procurement, defined most clearly during an earlier dispute on OU8. The DOE maintains that significant actions have been taken to streamline the procurement process as a result of the OU8 dispute. The DOE has fully complied with the July 13, 1992 Resolution of OU8 Draft Phase I RFI/RI Workplan Dispute, and believes the outcome of that dispute is directly applicable to the question of procurement time for OU4. Implementation

of the streamlined Master Task Subcontract approach still requires in the range of 19 to 24 workdays for a contract of this magnitude. The DOE believes that the CDH is bound by the earlier decision relative to OU8 and that a minimum of 19 workdays is justified as good cause.

4) Incorrect IAG Data Validation Assumptions. The CDH allowed no additional time for data validation in excess of original IAG assumptions. It is the DOE position that data validation is a laboratory and validation subcontractor function which has been impacted in the same manner as initial processing of laboratory samples. The CDH is aware of DOE problems with laboratory performance and sample management, and successful reduction of average sample turnaround from 240 days to 75 days. Original IAG assumptions were for 63 days. This success was acknowledged and resulted in CDH granting 12 workdays for radiological sample analysis. The DOE believes that the CDH is arbitrary in failing to acknowledge similar problems with data validation averaging 45 workdays for all operable units versus an original IAG assumption of 21 workdays. Laboratory analysis and validation is contracted largely to maintain independence and meet IAG quality standards. This is beneficial to ultimate IAG goals, but subjects the DOE to market factors of supply and demand, most of which are beyond DOE control. The DOE will continue to attempt to manage laboratory analysis and validation to meet and even improve upon the original IAG assumptions. However, as that effort progresses good cause exists to grant 24 additional days for data validation. The DOE believes the CDH has already acknowledged efforts to mitigate the impacts of market forces beyond DOE control, and a good cause determination for 24 workdays for sample validation naturally follows the granting of 12 workdays for sample analysis.

5) Mitigating Efforts. The CDH provided no comment on DOE's proposal to mitigate future OU4 milestone impacts and other mitigating efforts. The DOE maintains that despite the delays described in our original letter and further justified above, we have remained committed to attainment of the ultimate IAG cleanup goals. A clear example of this is the actual execution of the OU4 workplan, in 89 days as compared to 138 days allowed by the IAG. For this dispute the DOE has proposed a plan which meets the requirements of RCRA closure of the ponds as the IM/IRA following the Phase I RFI/ RI Report is envisioned to accomplish. We believe this approach meets the requirements of RCRA and the Colorado Hazardous Waste Act, and provides a streamlined approach for remedial action decisions. Not only does this proposal put the DOE back on schedule for ultimate remediation of OU4, but we believe it provides a viable model to streamline remediation decisions for all other RCRA closure operable units

under the IAG. The DOE maintains that this approach is technically viable, programmatically sound, legally defensible, and should be supported by the CDH.

The CDH is also aware of the Nevada Test Site refusal to accept mixed low-level waste (including pondcrete) until Federal and State of Nevada approvals are granted. This action is beyond the control of DOE Rocky Flats as signator to the IAG. The DOE is also restricted by physical and permit limits from additional storage of newly created pondcrete from sludge removal. These impacts combined to preclude timely removal of sludge from the solar ponds to allow immediate execution of the workplan following CDH approval. The DOE has pursued a detailed option analysis to mitigate these impacts and has provided several briefings to CDH on this topic. The DOE maintains that impacts beyond the control of DOE Rocky Flats, have created a continuing, justifiable schedule delay in parallel with other factors detailed above.

REFERENCES

Several documents have been referenced in the above description of the DOE position and basis for the position. These documents are all in the possession of all parties to the IAG. To limit excess paper, the DOE is not transmitting copies of the referenced documents. It is anticipated that the parties will consult their own files prior to dispute resolution meetings. Any additional information which is needed to facilitate dispute resolution will be provided to all parties during the meetings. These documents will be captured formally in either the Statement of Dispute Resolution issued by the Project Coordinators or the Written Statement of Dispute forwarded to the Dispute Resolution Committee.